No. 2815

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IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN BANK OF ALASKA, a Corporation,
Plaintiff in Error,

vs.

G. JOHNSON, as Trustee in the Matter of T. MITCHELL & CO., etc.,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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THE AMERICAN BANK OF ALASKA,
Plaintiff in Error,

vs.

G. JOHNSON, as Trustee in Bankruptcy in the Matter of T. MITCHELL & CO., a Mining Copartnership Consisting of THOMAS MITCHELL, JAMES J. FALLON and HERMAN FAWCETT, Bankrupts,
Defendant in Error.

Brief of Defendant in Error.

STATEMENT OF CASE.

No brief on behalf of the plaintiff in error has been served on us, and therefore the best we can do is to state our case and the reasons in law and fact in support of the record as made in the trial court.

The plaintiff below, as trustee for T. Mitchell & Co., a mining copartnership composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, commenced an action in the District Court here to recover from the American Bank of Alaska the proceeds of a sale of gold-dust made by said company to the Bank on the evening of July 31, 1913. The company commenced mining operations about January, 1913, on a placer claim situate on Esther Creek, in the Fairbanks Precinct, Territory of Alaska. James J. Fallon was the business manager of the firm, and as such kept the books and handled the cleanups and

issued checks in payment of labor and other bills in connection with their mining operations. At the start, Fallon had about $1,500.00 in cash; the other two partners had no property. From the time of commencing operations until the first cleanup in July, 1913, Mr. Fallon borrowed from the Bank some small sums of money, and gave either his own or the firm's notes to evidence the same. The mining company had an arrangement whereby, when cleanups were made, they were to fetch the same to Fairbanks, sell the gold-dust to the Bank, and the proceeds thereof were to be deposited to their account and Mr. Fallon, as business manager for the copartnership, was to draw checks thereon. The first cleanup, amounting to $1,904.35, occurred on the 3d day of July, 1913, and the second, amounting to $2,213.14 was made on the 18th day of July, 1913, and Mr. Fallon issued checks against the proceeds of the sales of gold-dust from the said first two cleanups, which were duly honored and paid. The third or last cleanup was brought in by Mr. Fallon and delivered to the Bank between 5 and 6 o'clock on the evening of July 31, 1913, and was of the value of $3,750.27, which amount was entered in the firm's pass-book as of the date of July 31, 1913 (Record, p. 22), and in the record of individual deposits as of August 1, 1913 (Record, p. 166). Fallon intended to and did deliver the third or last cleanup on the same terms as the other cleanups had been sold and delivered, and prior to coming to Fairbanks from Esther Creek, relying thereon, had issued checks to the laborers for their wages. Between July 26th and

31st, 1913, conversations over the telephone had taken place between Mr. Fallon and the officers of the Bank, in which they were informed that the mining firm expected that the third cleanup would be of the value of about $8,000.00. (Record, pp. 56, 57.) When the third or last cleanup was delivered, it was immediately cleaned up and weighed by the gold-dust man, Mr. Paul Hopkins, and the value was ascertained to be $3,750.27 as above stated. Between 8 and 9 o'clock on the evening of July 31, 1913, a garnishment was served on the Bank in the case of Rutherford & Widman vs. The Copartnership Firm of T. Mitchell & Co., wherein the plaintiffs were seeking to recover the sum of $410.80, and were endeavoring to reach the proceeds of the sale of gold-dust from said third or last cleanup.

At the time the gold-dust was left at the Bank, on the evening of July 31, 1913, the company owed the sum of $4,096.04 represented by notes and over-checks or overdrafts that had theretofore been paid for the firm of T. Mitchell & Co.,—$1,504.00 of which was represented by notes, and the balance was for overdrawn account. The last or third cleanup was weighed up and the value thereof ascertained prior to 6 o'clock on the evening of July 31, 1913, and the Bank *immediately appropriated it* in part payment of the debt of $4,096.04 then owed to it by the firm of T. Mitchell & Co., and represented by said notes and overdrawn account; it claiming the right to set off the same as against said indebtedness. If this setoff was not actually made prior to 6 o'clock on that

evening, then it was between 8 and 9 o'clock of the same evening and at the time of the service of the garnishment in the Rutherford & Widman case; but in any event, it took place on the evening of July 31, 1913, and was accomplished without consultation with the firm of T. Mitchell & Co., without their consent, and without their knowledge until between 9 and 10 o'clock on the morning of August 1, 1913, at which time Mr. Fallon was informed that the appropriation had been made and that the outstanding checks of the firm would not be honored. When the Bank opened for business on the morning of August 1, 1913, Tony Liongavich, who held a check for $148.50 issued by the firm of T. Mitchell & Co., presented the same for payment in the usual way but it was dishonored; and none of the outstanding checks of the firm were paid thereafter.

Plaintiff below, as trustee for the creditors of the bankrupt firm of T. Mitchell & Co., brought this action against the Bank on the theory that its purchase of the third or last cleanup on the evening of July 31, 1913, and the appropriation of the proceeds thereof in payment of the firm's indebtedness at a time when it knew and had reasonable cause to believe that the said firm was insolvent, constituted an unlawful preference, and was voidable under Section 60 of the Bankruptcy Act. (For Amended Complaint, see Record pp. 4 to 9.)

The jury found a general verdict in favor of the trustee for the $3,750.27, and answered three of the five special interrogatories submitted to them, two of the answers covering the question of the Bank's

knowledge of the financial condition of T. Mitchell & Co., upon which judgment was entered for the trustee.

ARGUMENT.

I.

There is no dispute about the facts.

James J. Fallon, the principal witness on behalf of the trustee, testified that he brought the third or last cleanup from Esther Creek to Fairbanks and delivered it at the American Bank of Alaska between 5 and 6 o'clock on the evening of July 31, 1913, and that on the next morning, to wit, August 1, 1913, at about 9:20 o'clock, he was told by Mr. A. Bruning, the cashier that the proceeds of the cleanup had been appropriated by the Bank and setoff against the indebtedness of the firm of T. Mitchell & Co. and that the outstanding checks of that firm would not be honored. Herman Fawcett, another member of the firm, testified that on the evening of July 31, 1913, he called at the Bank and made some inquiries there in reference to whether the proceeds of said third or last cleanup were liable to attachment (he having heard that a man by the name of Nelson, whom the firm owed, was threatening attachment proceedings), and was told by Mr. Bruning that it was not subject to seizure, for the reason that it had been appropriated in payment of the firm's indebtedness. Tony Liongavich testified in regard to presenting the firm's check for $148.50 at the Bank when it opened for business on the morning of August 1, 1913, and to the fact that payment was refused.

Fallon's testimony commences at page 49 and extends to page 84; Fawcett's from page 99 to page 101, and Liongavich's from page 101 to page 102, of the record.

Mr. A. Bruning, cashier of the Bank, in his evidence commencing at page 146 of the record, states in regard to these significant happenings, among other things the following:

"Q. You're sure the whole thing happened and it was all cleaned up and the amount ascertained before 6 o'clock? A. Yes, sir. Q. And just as soon as you got it ascertained, you set it off against the notes and overdraft? A. As soon as I made out the deposit slip so that I knew how much the cleanup amounted to, I charged up the notes as that slip shows. Q. You made the setoff right then and there? A. Certainly I did. Q. Before 6 o'clock? A. As soon as—(interrupted). Q. (Continuing)—On the evening of July 31, 1913? A. Yes, sir."

And on page 152 of the record:

"Q. Didn't you say a while ago that that setoff was all accomplished prior to 6 o'clock on the evening of July 31, 1913—didn't you so testify? A. I have told you and will tell it again—that we made the credit as soon as the dust was weighed and right after that I charged up the notes. Q. That was before 6 o'clock. A. That was before 6 o'clock. Q. And from that time on you didn't intend to cash any more checks for T. Mitchell & Co.? A. Then you said Mr. Fallon told me he had issued checks for large amounts— Q. You're talking about some-

thing else. A. No, you asked me that. You said that Fallon came in and said he had issued checks for large amounts for the workmen and others, and according to your idea I suppose I should go on cashing them even with a small cleanup. Q. You now want to tell the jury that you didn't make up your mind to make that setoff and not cash any more checks until the attachment was served? A. No; I said I made up my mind not to allow any more overdrafts when that attachment was served. A. Ain't that what I have been talking about? A. I don't know what you're talking about. Q. I tried to get you to tell when it was that you made up your mind that you wouldn't cash any more checks of T. Mitchell & Co.—over-checks? That was 6 o'clock, was it? A. No. Q. When was it? A. I told you after the garnishment. The testimony will show that I was garnished about 8 or 9 o'clock. Q. Then you made up your mind for a certainty that you wouldn't cash any more checks if they were over-checks? A. Certainly. Q. And you knew then that Mitchell & Co. didn't have anything on file? A. I knew they had nothing to their credit. Q. That meant that you weren't going to cash checks at all. A. As long as I wasn't allowing any overdraft. Q. Why wouldn't you cash any more checks for them? A. Because when a house is on fire I'm not going to place insurance. Q. You knew the house was on fire at that time? A. Certainly. When a man jumps another with an attachment it is about time to keep hands off."

From the testimony, on both sides, and especially that of the cashier, Mr. Bruning, it is perfectly apparent that the proceeds of the gold-dust from the third or last cleanup were applied in payment of the past due indebtedness of the firm of T. Mitchell & Co., and were never placed on deposit by the Bank for a moment of time, as a deposit in favor of that company. A deposit, when made in a bank, means that the depositor has left his money thereat subject to his check; and when that is done, the relation of debtor and creditor as between the depositor and the bank immediately arises. But the exact opposite occurred in this case. True, the proceeds of the gold-dust were entered in the pass-book of T. Mitchell & Co. on the evening of July 31, 1913, and in the book containing the business transactions of the following day, August 1, 1913. If that was all the testimony there was on the subject it would have appeared as an ordinary case of deposit subject to check; but that *prima facie* situation was shown not to be the real one by the testimony of Fallon, Fawcett and Liongavich, and demonstrated to be otherwise by the testimony of the cashier, Mr. Bruning.

At the trial the Bank claimed the right to do what it did under Sec. 68 of the Bankruptcy Act in relation to setting off mutual debts; but that position is wholly untenable, for the reason that the amount and value of the gold-dust never became a deposit subject to check, nor, with reference to the sum of $3,750.27 did the relation of debtor and creditor ever arise as between the Bank and the firm of T. Mitchell & Co. On the contrary, it was treated and ap-

propriated as a payment of the debt of the company due and owing at that time.

It may be argued that an unlawful transfer operating as a preference under Sec. 60 of the Bankruptcy Act involves the idea that the debtor must be an actor, along with the one asserted to have received the preference, before it can be said that the transfer is voidable; but that contention was set at rest by the Supreme Court of the United States in the case of Wilson Bros. v. Nelson (183 U. S. 191; S. C., 46 L. Ed. 147, 151), where the following language is used in the opinion:

> "The Act of 1898 makes the result obtained by a creditor, and not the specific intent of the debtor, the essential fact."

Again, in Mechanic & Metals Bank vs. Ernst et al., 231 U. S. 60, S. C., 58 L. Ed. 121, the same doctrine was announced. In that case, the bankrupt firm deposited $54,048.08, expecting and intending that the same should be placed on the books as a deposit subject to check; but immediately before or immediately after the money reached the bank, the cashier ordered that no more checks of that firm be honored, and thereupon appropriated said sum of money in part payment of an indebtedness due it from the bankrupt. This was held to be a preferential transfer. At the trial in the case at Bar we relied upon the Ernst case, and we see no reason why it does not compel an affirmance of the verdict and judgment rendered below.

The circumstance that in this case the appropriation of the money and the notification that it was

not subject to check came after the sale and delivery of the gold-dust can make no difference, because on the next banking day—which was August 1, 1913—the checks of T. Mitchell & Co. were dishonored, for the reason, as the cashier said in his evidence, that company had no credit there—the value of the gold-dust having been applied in payment of their indebtedness to the Bank. The latter by this means got its debt in full, approximately at least, and the laborers and other creditors got nothing.

Mechanic & Metals Bank vs. Ernst et al., 231 U. S. 60; S. C., 58 L. Ed. 121.

Wilson Bros. vs. Nelson, 183 U. S. 191; S. C., 46 L. Ed. 147, 151.

Gabriel vs. Tonner (Cal.), 70 Pac. 1021.

COLLYER ON BANKRUPTCY, pp. 657, 658.

II.

Plaintiff in error will, no doubt, criticise the practice followed in the lower court in the matter of special findings of fact. Five questions or special interrogatories were submitted, three of which were answered and two were not; that is to say, questions numbered 2 and 3 were not answered. Questions numbered 1, 4 and 5 covered the important questions of fact involved in the pleadings and evidence, and were all answered in the affirmative and against the plaintiff in error. The whole case hinged on whether or not the $3,750.27 was a deposit in the Bank subject to check at the time of the attempted setoff, and the questions were all framed, apparently, with the idea in view of entrapping the jury into

making use of the word "deposit" in connection with the transaction. The witnesses had spoken of the proceeds of the gold-dust as a "deposit" in the sense, however, that the gold-dust had been left in the Bank, and not in the legal sense for which the trustee was contending, "viz.," that the money value thereof was not, in law, a 'deposit,' because it was never subject to check, but, on the contrary, was appropriated immediately by the Bank in payment of its demand against T. Mitchell & Co." So that the use of the word "deposit" in questions 4 and 5 can be reconciled with the general verdict, which finds the allegations of the amended complaint to be true, to wit, "that the Bank purchased the gold-dust, applied the value thereof to the payment of a past due indebtedness of the mining copartnership, and that there was no deposit thereof made which would create the relation of debtor and creditor as to said sum of $3,750.27." (Record, pp. 6 and 7.)

The Alaska Code provides that the Court may submit special findings, and the Supreme Court of Oregon has held that it is discretionary with the Court as to whether it submits any; and further, having submitted them, and the jury being unable to agree upon the answers, the Court may receive the general verdict without requiring answers to the special findings. The history of the procedure in the matter of special findings will be found at pages 192, 193, 194 and 195 of the Record, from which this Court will see that after the jury had been out for a time, they returned into open court and inquired whether they would be permitted to answer a part only of the ques-

tions in the event they could not agree upon and answer all; that thereupon the Court called the attorneys for both parties to his desk, and it was agreed by all of them that the Judge should orally instruct the jury that they might answer such questions as they could agree upon and omit to answer those about which there was a difference of opinion, which the Court then and there did; that the jury retired and in a short time returned with a general verdict for the trustee and their answers to three of the questions, but with no answers to the remaining two; that upon the reception of the verdict and special findings, no objection whatever was made, and the same were received and filed, and became the basis of the judgment in the case.

It is true that complaint was made of this procedure upon the motion for new trial and otherwise; but if there was any irregularity connected with it, it was waived by the proceedings narrated. This exact question has been before the District Court of Alaska and the holding was as we contend for.

COMPILED LAWS OF ALASKA 1913, sec. 1037.

Rohr vs. Isaacs, 8 Ore. 451.

Swift vs. Mulkey (Ore.), 12 Pac. 76.

Reams vs. McAlpine, 2 Alaska, 165.

Spokane & I. E. Ry. vs. Campbell, 217 Fed. 217; S. C., 36 Sup. Ct. Rep. 683 (Advance Sheet No. 16).

Respectfully submitted,
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